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JUL 8 1955
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1954.

No. 215

JOHN JOSEPH PROCHASKA, JR.,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Chicago 3, Illinois,
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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1954.

No. .....

JOHN JOSEPH PROCHASKA, JR.,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

John Joseph Prochaska, Jr., petitioner, prays that a writ of certiorari be issued by this Honorable Court to review the judgment of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division.

OPINIONS BELOW.

The trial court filed no opinion. The opinion of the Court of Appeals for the Seventh Circuit has not been published. It appears in Appendix A page 13. The dissenting opinion of Major, C. J. appears in Appendix A page 15.

JURISDICTION.

The opinion of the United States Court of Appeals for the Seventh Circuit was entered on April 26, 1955. Petitioner's Petition for Rehearing was denied on June 10, 1955. This petition is filed within thirty days of that date. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED.

1. Where the statute requires that a communication express a specific threat "to injure the person of the addressee" and the communication appearing in the indictment does not contain such specific threat, may the indictment be vitalized and amended by giving judicial "connotation" and "implication" to the words used in the communication in the indictment?

2. May the federal judiciary create a crime by holding that the statute extends to a case not covered by the words used in the statute?

3. Do "connotation" "implication" and "well nigh explicit threat" as found in the Majority Opinion of the Court of Appeals meet the statutory requirement of a specific threat "to injure the person of the addressee"?

4. A. Does a communication contain a specific threat "to injure the person of the addressee" which is in words as follows:

> "Okay Maurie, this is it, get it and get it straight because you have only one chance. We want $10,000.00 cash in 10's and 20's to be placed by you in a place designated by us in our next letter. You have 5 to 7 days. If you should wish to contact us please do so by advertising under personals in the Tribune. Please Maurie, make it easy on yourself by co-operating fully * * *" (Tr. 4-5).

B. May it not as reasonably be said to express no specific threat, or

C. A threat "to injure the person of another", a threat "to injure property", a threat "to injure reputation", a threat "to accuse the addressee of crime", which are denounced in other provisions of Section 876, Title 18, United States Code?

5. Where the statute requires a specific threat "to injure the person", may the Court, in construing an indictment under it, add to, enlarge and amend the same, and by "implication" and "connotation" impute to the words used unwarranted signification and thus include what is not plainly embraced within the language of the statute?

STATUTES INVOLVED.

TITLE 18 U. S. C.

§ 876. Mailing threatening communications

Whoever knowingly deposits in any post office or authorized depository for mail matter, to be sent or delivered by the Post Office Department or knowingly causes to be delivered by the Post Office Department according to the direction thereon, any communication, with or without a name or designating mark subscribed thereto, addressed to any other person, and containing any demand or request for ransom or reward for the release of any kidnapped person, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

Whoever, with intent to extort from any person any money or other thing of value, so deposits, or causes to be delivered, as aforesaid, any communication containing any threat to kidnap any person or any threat to injure the person of the addressee or of another, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

Whoever knowingly so deposits or causes to be delivered as aforesaid, any communication with or without a name or designating mark subscribed thereto, addressed to any other person and containing any threat to kidnap any person or any threat to injure the person of the addressee or of another, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Whoever, with intent to extort from any person any money or other thing of value, knowingly so deposits or causes to be delivered, as aforesaid, any communication, with or without a name or designating mark subscribed thereto, addressed to any other person and containing any threat to injure the property or reputation of the addressee or of another, or the reputation of a deceased person, or any threat to accuse the addressee or any other person of a crime, shall be fined not more than $500 or imprisoned not more than two years, or both. June 25, 1948, c. 645, 62 Stat. 741.

STATEMENT OF THE CASE.

The indictment (Appendix B Page 17), brought under the second paragraph of Section 876, Title 18, U. S. C., charges that the defendant did, on July 31, 1953, with intent to extort from Maurice B. Frank, a sum of money, deposit with and cause to be delivered by the Post Office Department, a letter which contained a threat to injure the person of the addressee. The letter, set forth verbatim in the indictment, is as follows:

> "Okay Maurie, this is it, get it and get it straight because you have only one chance. We want $10,000.00 in cash in 10's and 20's to be placed by you in a place designated by us in our next letter. You have 5 to 7 days. If you should wish to contact us please do so by advertising under personals in the Tribune. Please Maurie, make it easy on yourself by co-operating fully * * *."

The defendant filed his Motion to Dismiss the Indictment and therein pointed out particularly the failure of the indictment to show that the mailed communication contained any threat "to injure the person of the addressee" as required by the statute (R. 8-9). The Motion was denied. A Motion in Arrest of Judgment, on the same grounds (R. 53), was likewise denied.

To preserve the question of the sufficiency of the indictment for review, trial was by the Court upon a waiver of a trial by jury. The defendant was convicted and sentenced to imprisonment.

The sole question presented to the Courts below was whether the indictment stated a crime under the second paragraph of Section 876, Title 18, United States Code, on the ground that the communication set forth in the indictment did not contain a threat "to injure the person of the addressee".

The foregoing, is therefore, the only matter material to a consideration of the questions presented.

REASONS FOR GRANTING THE WRIT.

A. The Court of Appeals, in extending the statute to a case not within its terms, has decided a federal question in conflict with applicable decisions of this Court and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

> "A criminal law is not to be read expansively to include what is not plainly embraced within the language of the statute (*United States* v. *Resnick*, 299 U. S. 207, 81 L. ed. 127, 57 S. Ct. 126; *M. Kraus & Bros.* v. *United States*, 327 U. S. 614, 621, 622, 90 L. ed. 894, 898, 899, 66 S. Ct. 705), since the purpose fairly to apprise men of the boundaries of the prohibited action would then be defeated. *United States* v. *Sulli-*

van, 332 U. S. 689, 693, 92 L. ed. 297, 301, 68 S. Ct. 331; *Winters* v. *New York,* 333 U. S. 507, 92 L. ed. 840, 68 S. Ct. 665."

Kordel v. *United States,* 335 U. S. 345, 349, 93 L. Ed. 52, 56.

B. The decision of the Court of Appeals imputing to Congress an intention to penalize not only the express threats denounced by the statute but also "any language or expression which carries with it the reasonable connotation of a threat to injure the person of the addressee" is in conflict with applicable decisions of this Court.

The statute, Section 876, Title 18 U.S.C. (Page 3), does not deal with any and every threat nor with threats by innuendo or implied threats. By specific and unequivocal language, it punishes only (a) demands for ransom for the release of a kidnapped person, (b) threats to kidnap, (c) threats to injure the person of the addressee or of another, (d) threats to injure property, (e) threats to injure reputation, (f) threats to accuse of a crime.

As pointed out in the dissenting opinion of the Court of Appeals (Appendix Page 15), "Congress has not penalized the mere mailing of a threatening letter but has carefully enumerated the persons against whom the threat must be directed and the objects to be accomplished."

That there is a wide disparity of punishment in the various provisions of the Section is also noted in the dissent of Judge Major.

In *United States* v. *Resnick,* 299 U. S. 207, 209, it is held:

> "Statutes creating crimes are to be strictly construed in favor of the accused; they may not be held to extend to cases not covered by the words used. *United States* v. *Wiltberger,* 5 Wheat. 76, 95. *Fasulo* v. *United States,* 272 U. S. 620, 628."

In *Pierce* v. *United States,* 314 U. S. 306, 311, this Court observed:

> "* * * a comparable judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness. Cf. *Lanzetta* v. *New Jersey,* 306 U. S. 451, and cases cited. While the act should be interpreted 'so as * * * to give full effect to its plain terms,' *Lemar* v. *United States,* 241 U. S. 103, 112; *United States* v. *Barnow,* 239 U. S. 74, we should not depart from its words and context."

The Court of Appeals in holding "connotation" and "implication" sufficient to satisfy the statutory requirement of a specific "threat to injure the person", has enlarged the statute to include an act not enumerated therein.

In *United States* v. *Evans,* 333 U. S. 483, 486, this Court said:

> "But strong as the presumption of validity may be, there are limits beyond which we cannot go in finding that Congress has not put into so many words or in making certain what it has left undefined or too vague for reasonable assurance of its meaning. In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial, functions."
>
> * * * * *
>
> "It is better for Congress, and more in accord with its function, to revise the statute than for us to guess at the revision it would make. That task it can do with precision. We could do no more than make speculation law."

The decision of the Court of Appeals is in direct conflict with the decision in *Sarlls* v. *United States,* 152 U. S. 570, wherein this Court said (pp. 574, 575):

> "We cannot agree with this method of reading a penal statute. The purpose of such a statute is to

notify the public of the legislative intent, not to furnish scientific definitions. That intent is, in most cases, to be found by giving to the words the meaning in which they are used in ordinary speech.

"Nor can courts, in construing penal statutes, safely disregard the popular signification of the terms employed, in order to bring acts, otherwise lawful, within the effect of such statutes, because of a supposed public policy or purpose. The danger of substituting for the meaning of a penal statute, according to the popular and received sense, the conjecture of judges as to a supposed mischief to be corrected, is pointed out by Chief Justice Marshall, when, in the case of *United States* v. *Wiltberger*, 5 Wheat. 76, 96, he said: 'To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of a kindred character, with those which are enumerated."

The decision is also directly in conflict with the rule as stated in *Morissette* v. *United States*, 342 U. S. 246, 263, 96 L. Ed. 288, 300, wherein this Court said:

"The spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute."

C. If this decision is permitted to stand, it will set a dangerous precedent. This Court should exercise its power of supervision because a question is presented herein both fundamental and far reaching in federal criminal law.

An omission in an indictment cannot be supplied by intendment or implication and the charge must be made directly, and not inferentially.

United States v. *Hess*, 124 U. S. 483, 486.

The words used in the letter in the indictment are in the English language and have not acquired a general signification different from their ordinary meaning and must be accepted in their ordinary meaning.

Nix et al. v. *Hedden*, 149 U. S. 304, 306.

People v. *Gastro*, 75 Mich. 127, 131, 42 N. W. 937.

The Court of Appeals has given an interpretation and "connotation" to the words of the communication in the indictment which does violence to the express words used.

If language which is the basis for a charge of crime may be taken out of context and given a meaning neither explicit nor implicit in the words used, and if speculation is to take the place of specificity and certainty, the words used could be made to express as many kinds of threats as the imagination could conjure up.

Thusly construed, they could be said to cover any of the various threats covered by Section 876, Title 18, U. S. C., which the prosecutor might select with the ever present danger to the defendant of double jeopardy.

D. The Court of Appeals has exceeded its powers respecting judicial notice.

The power of the Courts to take judicial notice is to be exercised with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt upon the subject should be resolved promptly in the negative.

Brown v. *Piper*, 91 U. S. 37, 23 L. Ed. 200.

A Judge's knowledge may not be the basis of a decision if not a matter of general knowledge.

Leong Kim Wai v. *Burnett*, 23 F. 2d 789 (C. A. 9).

E. The Court of Appeals has stated in its Opinion that it has found no guiding judicial interpretation of the statutory language of 18 U. S. C. A. Section 876.

The foregoing cited cases of this Court are all judicial guides in the interpretation of this criminal statute. So also is the case of *First National Bank of Anamoose* v. *United States*, 206 F. 374, 376, where the Court of Appeals for the Eighth Circuit said:

> "An Act which is not clearly an offense by the expressed will of the legislative department before it was done may not be lawfully or justly made so by construction after it is committed, either by interpolation of expressions or by the expunging of some of its words by the judiciary. Ex post facto construction is as vicious as ex post facto legislation. 'To determine that a case is within the intention of a statute its language must authorize us to say so.'
>
> • • • • •
>
> "The apparent and natural meaning of the terms of a statute is always to be preferred to any curious or hidden signification reached by the reflection and ingenious reasoning of unusually strong and acute minds."

F. The statute requires an express threat. In an apposite case it is said:

> "Here there must be the positive expression of intent and purpose, presently or in the future, to do the thing denounced."
>
> *United States* v. *Daulong*, 60 F. Supp. 235.

CONCLUSION.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted. It is respectfully submitted that the case should be remanded to the District Court with directions to dismiss the indictment on the ground that it does not come within the purview of the statute.

See *Amadio, Petitioner* v. *United States*, 99 L. Ed. 164 (Adv. Repts. #3 Dec. 20, 1954), reversing *United States* v. *Amadio*, 215 F. 2d 605 (C. A. 7).

Respectfully submitted,

GEORGE F. CALLAGHAN,
Attorney for Petitioner.

APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 11357. OCTOBER TERM, 1954, APRIL SESSION, 1955.

THE UNITED STATES OF AMERICA, *Plaintiff-Appellee,*
vs.
JOHN JOSEPH PROCHASKA, JR., *Defendant-Appellant.*

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

April 26, 1955.

Before MAJOR, LINDLEY and SWAIM, *Circuit Judges.*

LINDLEY, *Circuit Judge.* Defendant was indicted on the charge that he, with intent to extort from Maurice B. Frank a sum of money, deposited with and caused to be delivered by the Post Office Department, a letter addressed to Frank, containing a threat to injure the person of the addressee, in violation of 18 U.S.C. Sec. 876. The document, set forth verbatim in the indictment, is as follows: "Okay, Maurie, this is it, get it and get it straight because you have only one chance. We want $10,000.00 cash in 10's and 20's to be placed by you in a place designated by us in our next letter. You have 5 to 7 days. If you should wish to contact us please do so by advertising under personals in the Tribune. Please Maurie, make it easy on yourself by cooperating fully."

The cause was tried without a jury, on the stipulation of the parties that defendant mailed the letter, as well as

others of like import, to the addressee, and that he was apprehended by agents of the Federal Bureau of Investigation immediately after he had picked up a parcel which he supposed contained the money demanded.

Defendant's motion to dismiss on the ground that the letter failed to disclose any threat to injure the person of the addressee was overruled. His motion in arrest of judgment to the same effect was likewise overruled. He assigns error in each of these rulings, contending that any document, in order to amount to an offense under the Statute, must contain an express threat to do injury to the person of the addressee as well as an illicit demand for money, *i. e.*, that the statutory crime of extortion by mail cannot be based on innuendo or implied threats.

The statute provides in pertinent part: "Whoever, with intent to extort from any person any money or other thing of value, so deposits, or causes to be delivered [by the Post Office Department] any communication containing any threat * * * to injure the person of the addressee or of another, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both." 18 U.S.C.A. § 876. We have found no guiding judicial interpretation of this statutory language, but we think it obvious that Congress intended thereby to penalize every extortion demand by mail which is coupled with an express threat or with any language or expression which carries with it the reasonable connotation of a threat to injure the person of the addressee. Our decision, therefore, must depend on whether the essential significance of the language used by defendant necessarily constituted a threat to injure the person of Frank; whether the actual meaning of the language, plus its necessary suggested implications, was such as reasonably to instill in him the actual apprehension of impending bodily harm. We would render the statute impotent and define the crime as one depending on the de-

gree of ingenuity of each individual extortionist, if we were to require that the injury intended be precisely catalogued as to its physical nature or exact method of perpetration.

Measured by the proper test, we are of the opinion that the ruling of the trial court that this indictment was sufficient was sound. Written words or phrases take their character as threatening or harmless from the context in which they are used, measured by the common experience of the society in which they are published. Whatever the connotation of the language "Okay Maurie, this is it, get it and get it straight because you have only one chance" and "Please Maurie, make it easy on yourself by cooperating fully", when used in a different context or in a society different from ours, when employed by members of our society in context with an extortion demand its necessary implications are precisely clear. We note judicially that the slang expressions employed are a part of the stereotyped vocubulary of the Hollywoodesque underworld and are essentially synonymous with a promise of a "one-way ride." As such, they have become a universally understood part of our vocabulary. Not only are they not ambiguous in the connection in which they were here used, but, in fact, they express even more than by connotation a well nigh explicit threat of bodily harm. The admonitions that "you have only one chance" and "make it easy on yourself" remove any doubt that the threat was addressed to the person of Frank, the addressee.

The judgment is

AFFIRMED.

MAJOR, *C.J.*, dissenting. In my view, the letter set forth in the indictment does not constitute an offense under the provision of the statute relied upon. Assuming that the letter contained a threat, which I think it did, that is not

sufficient. It must be a threat "to injure the person of the addressee or of another." It is a matter of speculation and guess as to whether the threat was directed at the person of the addressee or some other person, for instance, a member of the addressee's family. More than that, Congress has not penalized the mere mailing of a threatening letter but has carefully enumerated the persons against whom the threat must be directed and the objects to be accomplished. For instance, in a paragraph following that relied upon it is provided that the sending of a threatening letter "with or without a name or designating mark subscribed thereto, addressed to any other person and containing any threat to injure the property or reputation of the addressee or of another, or the reputation of a deceased person" shall constitute a crime.

As I already stated, there is no way to ascertain from the letter as to whom or to what the threat was directed. The indictment charged that it was a threat to injure the person of the addressee, but it can be as readily speculated that it was a threat directed at the property or the reputation either of the addressee or some other person. The penalty provided for a violation of this latter section is a fine of not more than $500 or imprisonment of not more than two years or both, while the penalty provided for a violation of the section relied upon is a fine of not more than $5,000 or imprisonment of not to exceed twenty years, or both. With this disparity of punishment between the two provisions, it appears to me that there should at least be sufficient certainty to ascertain which section, if either, has been violated.

I would reverse the judgment.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois,
Eastern Division.

UNITED STATES OF AMERICA *vs.* JOHN JOSEPH PROCHASKA, JR.	No. 53 CR 625 Vio: Section 876, Title 18, U. S. C.

The September 1953 Grand Jury charges:

That on or about July 31, 1953, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, John Joseph Prochaska, Jr., defendant herein, unlawfully, wilfully, knowingly and feloniously with intent to extort from Maurice B. Frank a sum of money, to wit, Ten Thousand ($10,000.00) Dollars, did deposit with and cause to be delivered by the Post Office Department of the United States of America at Chicago, Illinois, a communication addressed as follows, to wit:

(Post Mark)
MR. M. B. FRANK,
5349 N. Sheridan,
Edgewater Hotel,
Chicago.

which said letter contained a threat to injure the person of the addressee as aforesaid, and which letter was in words as follows, to wit:

> Okay Maurie, this is it, get it and get it straight because you have only one chance. We want $10,000.00 cash in 10's and 20's to be placed by *you* in a place designated by us in our next letter. You have 5 to

7 days. If you should wish to contact us please do so by advertising under personals in the Tribune. Please Maurie, make it easy on your self by cooperating fully * * *

in violation of Section 876, Title 18, United States Code.

A TRUE BILL:
/s/ LYLE W. CAIN,
Foreman.

s/s OTTO KERNER, JR.,
United States Attorney.

APPENDIX C.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit,
Chicago 10, Illinois.

Tuesday, April 26, 1955.

Before

Hon. J. Earl Major, Circuit Judge.
Hon. Walter C. Lindley, Circuit Judge.
Hon. H. Nathan Swaim, Circuit Judge.

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
JOHN JOSEPH PROCHASKA, JR.,
Defendant-Appellant.

No. 11357

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED.

Friday, June 10, 1955.

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

APPENDIX C.

In the United States Court of Appeals
For the Seventh Circuit,
Chicago 10, Illinois.

Tuesday, April 26, 1955.

Before

Hon. J. Earl Major, Circuit Judge.
Hon. Walter C. Lindley, Circuit Judge.
Hon. D. Nathan Swaim, Circuit Judge.

John Darrin Sears et al., Plaintiffs-Appellees, vs. Jones Jersey Processors, Inc., Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, affirmed.

Friday, June 10, 1955.

It is ordered by the Court that the petition for writ of certiorari of this cause be, and the same is hereby, DENIED.

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CITATIONS

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Sonn v. *Magone*, 159 U. S. 417 — 5

State v. *Wilbourn*, 219 Iowa 120, 257 N. W. 571 — 5

United States v. *French*, 243 Fed. 785 — 5

Statute:

18 U. S. C. 876 — 2, 3, 6

353587—55

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 215

JOHN JOSEPH PROCHASKA, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 13–15), together with a dissenting opinion (Pet. 15–16), is reported at 222 F. 2d 1.

JURISDICTION

The judgment of the Court of Appeals was entered on April 26, 1955 (Pet. 19), and a petition for rehearing was denied on June 10, 1955 (Pet. 19). The petition for a writ of certiorari was filed on July 8, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether the communication set forth in the indictment contained a threat to injure the person of the addressee in violation of 18 U. S. C. 876.

STATUTE INVOLVED

18 U. S. C. 876 provides in pertinent part:

> Whoever, with intent to extort from any person any money or other thing of value, so deposits, or causes to be delivered, as aforesaid, any communication containing any threat to kidnap any person or any threat to injure the person of the addressee or of another, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.
>
> * * * * *
>
> Whoever, with intent to extort from any person any money or other thing of value, knowingly so deposits or causes to be delivered, as aforesaid, any communication, with or without a name or designating mark subscribed thereto, addressed to any other person and containing any threat to injure the property or reputation of the addressee or of another, or the reputation of a deceased person, or any threat to accuse the addressee or any other person of a crime, shall be fined not more than $500 or imprisoned not more than two years, or both.

STATEMENT

Petitioner was indicted in the United States District Court for the Northern District of Illi-

nois, on a charge that he, with intent to extort from one Maurice B. Frank a sum of money, deposited with and caused to be delivered by the Post Office Department a letter containing a threat to injure the person of Frank, the addressee, in violation of 18 U. S. C. 876 (Pet. 17–18; R. 4, 5). The letter, set forth verbatim in the indictment, is as follows:

> Okay, Maurie, this is it, get it and get it straight because you have only one chance. We want $10,000.00 cash in 10's and 20's to be placed by you in a place designated by us in our next letter. You have 5 to 7 days. If you should wish to contact us please do so by advertising under personals in the Tribune. Please Maurie, make it easy on yourself by cooperating fully.

Trial by jury was waived (R. 28) and it was stipulated by the parties that petitioner mailed the letter and was arrested by agents of the F. B. I. immediately after he had picked up a parcel thought by him to contain the money (R. 15, 24). The District Court denied motions to dismiss the indictment and in arrest of judgment, rejecting petitioner's contention that the letter set forth in the indictment failed as a matter of law to show any threat to injure the person of the addressee (R. 8, 11, 55). Petitioner was convicted and sentenced to imprisonment for two years (R. 30).[1]

[1] Under 18 U. S. C. 876, the maximum permissible sentence for this offense is twenty years and a $5,000 fine.

On appeal the judgment was affirmed (Pet. 19). Circuit Judge Major dissented on the ground that although the letter contained a threat, there was no way to ascertain to whom or to what the threat was directed.

ARGUMENT

Contrary to petitioner's argument (Pet. 5–10), the decision below is in full accord with applicable decisions of this Court. There is no conflict among the circuits, no important question is raised, and there is no occasion for further review.

Both the majority and dissenting judges in the court below agree that the statute under which the indictment was laid requires not only a threat, but a threat "to injure the person of the addressee." All agree, and petitioner appears to concede, that the letter petitioner mailed constituted a threat. Thus the only issue is whether the particular language of the letter here involved could properly be held to be a threat to the person of the addressee.

1. Recognizing that the meaning of the letter was obvious to a person of ordinary intelligence, the court below correctly held that the threat was one to injure the person of the addressee. The terse phrases "this is it," "get it and get it straight," "you have only one chance," when coupled with the ominous $10,000 extortion demand and the intimidating admonition to "make it easy on yourself by cooperating fully," are

more than sufficient to connote to the mind of the average individual in our present-day society a threat of impending physical violence to his person. The court below properly took judicial notice of the meaning of such universally understood expressions. See *Nix* v. *Hedden,* 149 U. S. 304, 306–307; *Sonn* v. *Magone,* 159 U. S. 417, 421.

Both at common law and under statutory enactments it is generally recognized that a "threat" need not be in any particular form of words so long as the language used would tend to unsettle the mind of the person at whom the threat is directed. See *e. g. United States* v. *French,* 243 Fed. 785, 786 (S. D. Fla.); *Commonwealth* v. *Murphy,* 94 Mass. 449, 450; *State* v. *Wilbourn,* 219 Iowa 120, 125, 257 N. W. 571, 574. Similarly the threat to injure a person need not follow any rigid formula or specific language. As the majority below held, the test must be "whether the actual meaning of the language, plus its necessary suggested implications, was such as reasonably to instill in him [the addressee] the actual apprehension of impending bodily harm" (Pet. 14).

2. The decision below does not conflict with any relevant decisions of this Court or of any of the circuits. Indeed petitioner's assertion of a conflict rests not on any specific or direct conflict of decisions, but solely on a claim that the court below failed to apply recognized standards of

interpretation in holding that petitioner's letter threatened injury to the person of the addressee in violation of 18 U. S. C. 876.

In contending that the statute covers only illicit demands for money accompanied by an "express threat" (Pet. 6), petitioner goes far beyond the universally recognized rule that penal statutes are to be strictly construed. The statute is clear and definite. It expressly covers "any threat to injure the person of the addressee." Under the guise of strict construction, petitioner actually seeks to rewrite the statute and to defeat its obvious purpose. As recognized by the court below, petitioner's reading "would render the statute impotent and define the crime as one depending on the degree of ingenuity of each individual extortionist" (Pet. 14–15).

In deciding that petitioner's letter threatened injury to the addressee's person, the Court of Appeals properly recognized that "[w]ritten words or phrases take their character as threatening or harmless from the context in which they are used, measured by the common experience of the society in which they are published" (Pet. 15), and correctly applied this rule to the facts of this case.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1955.

U. S. GOVERNMENT PRINTING OFFICE: 1955

Office - Supreme Court, U.
FILED
AUG 22 1955
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 215

JOHN JOSEPH PROCHASKA, JR.,
Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

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THE BLAKELY PRINTING COMPANY, CHICAGO

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ARGUMENT.

In the Brief for the United States, counsel for the Government states "Thus the only issue is whether the particular language of the letter here involved could properly be held to be a threat to the person of the addressee" (Br. 4). And, again, at page 5, "a 'threat' need not be in any particular form of words so long as the language used would tend to **unsettle the mind** of the person at whom the threat is directed." Both of these statements overlook the plain, unequivocal language of the Statute. Its words plainly prescribe that the threat must be "to

injure the person of the addressee." It is thus clearly indicated that the threat must be one to do physical violence. The threat must be a positive expression of the intent and purpose, presently or in the future, to inflict physical violence upon the person to whom the communication is sent. A threat "to the person of the addressee" or language which would "tend to unsettle the mind" of the addressee, is not sufficient.

In *Norris* v. *Grove*, 100 Mich. 256, 58 N. W. 1006, injury to the person is defined as

> "A hurt or damage done to a man's person such as a cut or bruise, a broken limb or the like as distinguished from an injury to his property or his reputation."

In *Commonwealth* v. *Mosby*, 39 N. E. 1030, 163 Mass. 291, the Court said:

> "A threat to injure the person of another naturally means a threat to use actual physical force upon the person of another."
>
> • • • • •
>
> "It has been said that a threat to arrest a person on a charge of crime is not a threat to injure the person of another, and we think that a threat to arrest a person in a civil proceeding cannot be held to be a threat to injure the person of another. See *Embry* v. *Com.*, 79 Ky. 439; *Britt* v. *State*, 7 Humph. 45."

The word "injure" is defined as to do harm to; to hurt; damage; impair; to hurt or wound; as the person; to impair the soundness of, as health.

> *Ziolkowski* v. *Continental Casualty Co.*, 1 N. E. 2d 410, 412; 284 Ill. App. 505, 510.

To injure is to do harm; to hurt; to damage; to hurt or wound the person. It indicates a hurting or wounding which does not result fatally. We speak of persons killed

and injured, thus making a wide distinction between the two.

Williamson v. *State,* 2 Ohio Cir. Ct. R. 292; 1 O. C. D. 492.

Assuming, but not conceding, that by a strained construction of the language used in the letter, a suggestion of a threat may appear, can it be said with certainty that the words used in the communication express either explicitly or implicitly "a threat to injure the person of the addressee"?

If the indictment, instead of charging a threat "to injure the person of the addressee", had charged "a threat to injure the person of another", the Court of Appeals could, by the same reasoning as employed in reaching its conclusion, have said that instead of a "one way ride" the words meant that some member of the addressee's family would be injured. Upon receipt of the letter, Frank, the addressee, feared for the safety of his daughter (R. 19) and, so, a threat to injure "another".

If the charge had been "a threat to injure property", the Court could as well have said that the words threatened arson. If the charge had been "threat to injure the reputation of the addressee or of another", the words might be construed to mean that the addressee or another would be accused of some sordid conduct.

The Court of Appeals in reaching its conclusion has erroneously substituted insinuation, connotation and innuendo for the statutory requirement of a specific "threat to injure the person" and thereby enlarged the Statute to include an act not included therein.

Respectfully submitted,

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